among the participants, "a nexus or link which makes them participants in the same game, method or device." He was of the opinion that such a nexus was an essential characteristic that was lacking in the case of the "characters lottery" which therefore was not a lottery within the meaning of the Ordinance.

Before us counsel for the appellant not only relied to some extent on the Singapore case of *Reg. v. Chew Thia Hiang, supra,* but took the argument of that case a step further. He said that what was involved was in effect a system of betting; that betting is dealt with by the Betting Ordinance and therefore can only be an offence in the circumstances envisaged by that Ordinance, as for example when carried on in a common betting house or by a bookmaker in a club or in a public place.

It may well be that the "characters lottery" is not a lottery in the sense in which that word is normally used by the ordinary man. It is certainly not a straightforward sweepstake like the Social Welfare lottery or the raffle of a turkey at the charity bazaar. But that is beside the point. The question is whether or not it is a lottery within the meaning given to that word by the Ordinance. Is it a "game, method or device whereby money.....is distributed.....in any manner depending upon..... chance"?

Reducing the matter to its simplest form what happens is that the operator says to all who care to hear him "the Kuala Lumpur Turf Club will conduct a sweepstake in connection with a certain race on Saturday; if you pay me $1 then if you successfully predict the last two digits in the number of the winning ticket in that sweepstake I will pay you $70". He then proceeds to accept dollars and predictions in accordance with that offer and, it is to be hoped, proceeds in due course to honour his promises if called upon to do so.

This may or may not be a game; it may or may not be a device; but it certainly is a method in the sense that it is a way of doing something. And what is it a way of doing? It is certainly a way of collecting money but it is also a way of distributing it, for as was said by Lord Hewart, L.C.J., in the case of *Director of Public Prosecutions v. Phillips.*[7] —

> " There is no magic in the word 'distribution'. The word 'payment' will do just as well."

And in what manner is it distributed? It is distributed in a manner depending upon chance, for it is by pure chance that the winning number of the Turf Club sweepstake is ascertained.

It is thus clear beyond peradventure that such an operation falls fairly and squarely within the statutory definition of a lottery. If the public may have access to it it is a public lottery and in any event until the contrary is proved it is to be deemed to be a public lottery (see section 2 of the Ordinance). And if any person assists in carrying it on he is guilty of an offence in contravention of section 4(1)(c) of the Ordinance.

It may well be that there is also involved betting within the meaning of the Betting Ordinance, 1953 (incidentally there was no Betting Ordinance in the State of Johore prior to 1953 although there was a State Enactment corresponding to the Common Gaming Houses Ordinance). No doubt a person receiving stakes in connection with such an operation could in certain circumstances be prosecuted under the Betting Ordinance. That, however, is no reason why he should not be prosecuted and convicted under the Common Gaming Houses Ordinance. Certainly by reason of section 50 of the Interpretation and General Clauses Ordinance (which corresponds to section 33 of the English Interpretation Act, 1889) he cannot be prosecuted and convicted under both Ordinances in respect of the same act. That, however, does not mean that the prosecution are not at liberty to proceed under either Ordinance at their own choice.

Moreover it is clear that in England the fact that a scheme which would otherwise be a lottery involves an element of betting does not rescue it from the predicament of being a lottery (see *Coles v. Odhams Press Ltd., Supra,* and *Moore v. Elphick*[8]) and support for the view that the legislature here had the same intention is to be found in the wording of section 11 which refers to any "record of stakes or wagers in or relating to a lottery"

The appeal is dismissed.

Appeal dismissed.

Solicitor: *M. Ismail.*

EK LIONG HIN LTD. v. THE OFFICIAL ASSIGNEE of the Property of KOH HOR KHOON & ORS.

[C.A. (Whyatt C.J., Tan Ah Tah and Chua JJ.] January 13, 1958]

[Singapore — Civil Appeal No. 14 of 1957]

Moneylending — Moneylenders Ordinance (Cap. 193), s.2(d) — Carrying on any business

not having for his primary object the lending of money — Principal business as shipowners, warehousemen, rubber dealers, etc. — Lending money to customers on security.

This was an appeal from a judgment of Mr. Justice Knight in which the learned Judge held that the appellants were not entitled to enforce the contracts for two loans totalling $70,000 which the appellants entered into with a firm called Koh Bian Seng in December 1952 because they were moneylenders within the meaning of the Moneylenders Ordinance and had failed to comply with the technical requirements of that Ordinance when making the loans.

The appellants, Ek Liong Hin Ltd., who carried on business as shipowners, warehousemen, rubber dealers and godown keepers, were in the habit of lending money on the security of goods stored in their godown. Such loans were usually fully covered by the value of the goods, and the interest charged varied between 12% and 18% per annum. They did so as this facility attracted business for their ships.

Held: the appellants carried on the perfectly legitimate business of godown keepers and as incidental to that business, they advanced money to customers on the security of the goods stored in their godowns and therefore were not moneylenders within the meaning of section 2 of the Moneylenders Ordinance.

Cases referred to:—

(1) *Samuel v. Newbold,* (1906) A.C. 461 at p. 469.
(2) *Edgelow v. McElwee* (1918), 118 L.T. 177.
(3) *Furber v. Fieldings Ltd.*, 23 T.L.R. 362.
(4) *Litchfield v. Dreyfus,* (1906) 1 K.B. 584.
(5) *Newman v. Oughton,* (1911) 1 K.B. 792.
(6) *Kirkwood v. Gadd,* (1910) A.C. 422.

CIVIL APPEAL.

K. Gould for the appellants.

Philip Hoalim Sr. for the respondents.

Cur. Adv. Vult.

Whyatt C.J.: — This is an appeal from a judgment of Mr. Justice Knight in which the learned Judge held that the appellants were not entitled to enforce the contracts for two loans totalling $70,000 which the appellants entered into with a firm called Koh Bian Seng in December 1952 because they were moneylenders within the meaning of the Moneylenders Ordinance and had failed to comply with the technical requirements of that Ordinance when making the loans.

The question whether the appellants fall within the ambit of the Moneylenders Ordinance depends upon the true construction of the statutory provisions defining the expression "moneylender" but before considering this point, it will be convenient to summarise the facts regarding the appellants' business and the two loans which are the subject of these proceedings. The appellants are a limited company, incorporated in Singapore in 1948 with a nominal capital of $2 000,000 and possessing assets worth approximately $10,000,000. They carry on a diversified business of shipowners, warehousemen, rubber dealers and rubber growers. The warehouse side of the business, described by the appellants' secretary as the godown storage department, was started in September 1951. At that time, the appellants' ships were running between Singapore and Indonesia and were facing considerable competition from rival shipping companies. Some of these companies, most of them in fact, owned godowns and were able to offer storage space to their customers, and as this facility appeared to attract business for the ships, the appellants also decided to open a godown department. As the appellants' shipping manager put it: "They (the godowns) benefit our shipping business as we can offer our customers space at any time they ask for it. Through being able to provide storage space I often get business for my ships which otherwise might go to other companies."

The provision of storage space was, however, only one aspect of the storage facilities offered by the shipping companies. In addition to providing storage space the companies, or at least a number of them, offered to make loans against the security of the goods stored in their godowns and customers availed themselves of these financial facilities from time to time when they were in need of money. Such loans were usually fully covered by the value of the goods, and the interest charged appears to have varied between 12% and 18% per annum. The appellants offered similar financial facilities when they opened their godown department in September 1951 and during the ensuing year they made loans to customers on the security of various goods stored in their godowns, ranging from bales of paper, cloth, rice, flour and tea to zinc sheets, pipes and padlocks. These loan transactions were normal mercantile transactions, judged by the custom and standards of merchants in the city of Singapore, and, in the words of a witness called by the appellants, it was the "sort of business which is a useful facility for members of the business community."

The two loans which are the subject of these proceedings were normal mercantile transactions

of this kind. The first was made to the firm Koh Bian Seng on the 3rd December 1952 for the sum of $30,000 on the security of 40 tons of galvanised iron sheets stored in their godowns and the second was made to the same firm on the 5th December 1952 for the sum of $40,000 against a further quantity of 60 tons of the same commodity likewise stored in their godowns. A few weeks after the loans were made Koh Bian Seng encountered financial difficulties and as the loans were not repaid, the appellants sold the galvanised iron sheets, crediting the proceeds against the loans; but the amount realised fell short of the sums advanced by $947.58. The appellants demanded payment of this outstanding balance but nothing was paid, and subsequently a Receiving Order and an Adjudication Order were made against Koh Bian Seng on the 27th February 1953 and the 24th April 1953 respectively, and the Official Assignee took charge of the debtor's affairs. It would appear from the record of the proceedings that it was only after the Official Assignee became concerned with this case that the issue was raised that the appellants were moneylenders and consequently were not entitled to recover the moneys which they had advanced. No such contention appears to have been raised by Koh Bian Seng before they became bankrupt and it would seem from the evidence of one of the partners of the firm that Koh Bian Seng have throughout regarded these loans as normal mercantile transactions. The Official Assignee, however, commenced proceedings against the appellants on the 8th November 1955 claiming a declaration that the contracts for the loans were unenforceable on the ground that the appellants were moneylenders and had not complied with the Ordinance when making the loans and asking that the galvanised iron sheets or their value should be returned; as already stated, judgment was given in favour of the Official Assignee.

The provisions of the Moneylenders Ordinance relevant to this issue fall to be considered under two heads, first, the general statutory provisions defining "moneylender" contained in section 2 and, secondly, the exception to the general statutory provisions which is to be found in paragraph (d) of that section. The terms of the general provisions, so far as they are material, read as follows:

> "'Moneylender' shall include every person whose business is that of moneylending, or who carries on..... or holds himself out in any way as carrying on that business".

As I have already mentioned, the appellants, after opening their godown department in September 1951, entered into numerous transactions for the loan of money and it is clear from the evidence that this became a remunerative and significant part of their normal business activities. It is true that the loans were only made against the security of goods stored in their godowns and that the rate of interest charged, if not modest, at any rate was not usurious, but these considerations do not affect the nature of the transactions. They were, in essence, moneylending transactions, and having regard to the fact that they were made continuously over a lengthy period, I have no doubt that they constituted a regular business of lending money. It follows, in my view that the appellants, being the lenders in all these transactions, are properly described as persons carrying on the business of moneylending and therefore come within the general provisions of the definition of moneylender in section 2 of the Moneylenders Ordinance. I might add that this conclusion is re-inforced by the provisions of section 3 of the Ordinance which provide that any person who lends money at interest shall be presumed, until the contrary is proved, to be a moneylender. The statutory presumption clearly arises in the present case as the appellants have admittedly lent money at interest, and so far from rebutting this presumption, the evidence strongly confirms it.

It remains only to consider the second point, namely, whether the appellants come within the exception provided for in paragraph (d) of section 2 which reads as follows:

> "Moneylender.....shall not include.....any person .....*bona fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money".

The wording of this exception is almost startling in its simplicity and I cannot help thinking that if Lord Macnaghten had had to consider it, he would have said of it as he said of other provisions of the Money Lenders Act 1900 when giving judgment in *Samuel v. Newbold*,[1] that any man of common sense was just as capable of deciding the questions which it raises as the most learned Judge in the land, provided he is not hampered by authorities, which require training to discriminate and appreciate at their true value. Accordingly I proceed, in the first instance, to consider the construction of this exception without reference to decided cases.

The first part of the exception provides that a moneylender shall not include a person

bona fide carrying on any business not having for its primary object the lending of money. The question whether the appellants were *bona fide* carrying on a business not having for its primary object the lending of money is a question of fact and the evidence on this point is overwhelmingly in favour of the appellants. The audited figures show that out of total assets of $10,000,000 only about $1,000,000 was out on loan and that the annual profit from the godown department (which of course includes the profit from providing storage space as well as the profit from making loans) amounted only to $143,694 whereas the gross profit of the appellant company as a whole was in the neighbourhood of $2,000,000. Clearly the primary object of the appellant company whatever else it may have been, was not that of lending money. Even if the godown department be regarded as a business separate from the other branches of the appellants' business activities — a point which was not argued by the respondent — it could not be said that its primary object was lending money since the evidence shows that loans were only made to those persons storing goods in their godowns who were in need of money and then only to such customers as were well-known to the appellants. In other words, the business of the godown department, taken by itself, was primarily a business of providing storage space, and was not a mere cover for a moneylending business.

The only remaining question therefore is whether the appellants lent money, (a) in the course of their business and (b) for the purposes of their business. As regards (a), it is clear from the evidence that these loans were made in accordance with the normal commercial practice of shipping and godown companies in Singapore and therefore it follows, in my view, that they were made in the course of the appellants' business. As regards (b), the evidence shows that the purpose of these loan transactions was to prevent the appellants losing customers to their competitors and it cannot, in my view, be said that money lent for such a purpose was not lent for the purposes of the appellants' business. As the appellants' godown manager put it; "If we did not allow certain customers loans against their goods, we would lose a lot of them. Several of our customers who use our godown storage also use our ships." In other words, the appellants, having opened a godown department in order to compete with the storage facilities offered by other shipping companies, found that they had to conduct the godown department in the same way as their competitors and make loans against the security of goods stored in their godowns in order to keep their customers. In my opinion such loans were clearly made for the purposes of the appellants' business within the meaning of the wording of this exception.

I feel no difficulty, therefore, when construing paragraph (d) of section 2 without reference to authorities, in reaching the conclusion that the appellants come within the scope of the exception and consequently are not moneylenders within the meaning of the Ordinance. But as Lord Macnaghten indicated in *Samuel v. Newbold, supra,* there are a number of authorities on the interpretation of the Money Lenders Act and it is necessary to consider them and assess their value. The authority which commended itself to the learned Judge in the Court below and which he treated as decisive against the appellants was the case of *Edgelow v. McElwee.*[2] That was a case in which McCardie J. found that a solicitor had used his vocation as a mere disguise to give a colourable professional appearance to numerous moneylending transactions and was, therefore, a money lender. It was contended on behalf of the solicitor that he came within exception (d) (which is the same as paragraph (d) of section 2 of the Singapore Ordinance) but McCardie J. said that "no system of loans would fall within the exception unless the loans were, in substance and actuality, directly incidental to the business which is the primary object and pursuit of the person who makes the loans" and held that the loans in question were not of that character. It is to be observed that McCardie J's *dictum* postulates that the lender has a business which is "his primary object and pursuit" and no doubt in the case of a solicitor, his professional business is his primary object and pursuit and therefore any loans would have to be incidental, in substance and actuality, to his professional work in order to come within the exception. A very good illustration of the kind of money lending which comes within the exception is given by Phillimore J. in *Furber v. Fieldings Ltd.*[3] where the learned Judge referred to solicitors who lend money of their own and receive in return, not merely and not primarily interest on that money, but profits on conveyances they might draw in connexion with the advances or fees for preparing mortgage deeds and other documents. "That class of solicitors," he said, "was certainly

intended to be excluded from the operation of the Act."

Where, as in the present instance, the business is a complex one and comprises not one "primary object and pursuit" but several objects, namely, shipping, warehousing, rubber dealing and rubber growing, it is plain that the *dictum* of McCardie J. cannot, from the nature of the case, be applied without modification. If an analogy is sought between the case of *Edgelow v. McElwee* and the present case, it would be that the lending of money to persons storing goods in the appellants' godowns was no more incidental to the activities of the warehouse business than the lending of money by the plaintiff in *Edgelow v. McElwee* was incidental to his professional work as a solicitor. But as I have already pointed out, the evidence establishes that the object of lending money to persons storing goods in the appellants' godowns was to increase, or at least, to maintain the godown department's business and therefore, the true analogy would be rather with the case given by way of illustration by Phillimore J. in *Furber v. Fieldings Ltd., supra,* where a solicitor lends money, not merely or primarily for the interest on the money, but for the purpose of maintaining or increasing his professional business and the resultant professional fees.

A more helpful *dictum*, in my opinion, than that of McCardie J., because it is more general in its application, is the *dictum* of Farwell J. in *Litchfield v. Dreyfus.*[4] "The Act," he states, "was intended to apply only to persons who are really carrying on the business of moneylending as a business, not to persons who lend money as an incident of another business." This *dictum* was approved by Ridley J. in *Newman v. Oughton*[5] who, after reading Farwell J's statement of the law, added, "I think that Lord Loreburn L.C. when discussing in *Kirkwood v. Gadd*[6] the meaning of carrying on business, intended to adopt the language of Farwell J. which I have read." In the present instance the appellants carried on the perfectly legitimate business of godown keepers and as incidental to that business, they advanced money to customers on the security of the goods stored in their godowns and therefore, in my view the *dictum* of Farwell J., approved by the Lord Chancellor in *Kirkwood v. Gadd, supra,* and by Ridley J. in *Newman v. Oughton, supra,* is precisely applicable to the facts of this case. Accordingly, even if it be correct to say, as Lord MacNaghten thought it was, that the authorities on the construction of the Moneylenders Act are hampering, I am of the opinion that when they are appreciated at their true value, they support the appellants' contention in this case. For these reasons I would allow the appeal. The respondent must pay the costs of the appeal and of the proceedings in the Court below.

Tan Ah Tah J.: — I agree.

Chua J.: — I have had the opportunity of reading the judgment of the learned President of the Court with which I concur and have nothing to add.

Appeal allowed.

Solicitors: *Rodyk & Davidson; Philip Hoalim & Co.*

MALAYAN WATCH TRADERS v. CHEONG KAM WOON trading as SEE SUN WATCH CO.

[O.C.J. (Rigby J.) January 13, 1958]

[Penang — Civil Suit No. 13 of 1956]

Practice and Procedure — Action for balance due in respect of goods delivered — Counter-claim by way of set-off for goods returned — Onus of proof.

The plaintiffs claimed from the defendant a sum of $52,887.50 as balance due to them in respect of goods, to wit, watches sold and delivered by them to the defendant between March 26, 1953 and November 8, 1954. In his defence the defendant admitted the debt to the extent of $7,149.60, but claimed by way of set-off that the plaintiffs had failed to credit him to the extent of $45,738 in respect of two consignments of watches returned by him to the plaintiffs.

On the application of the plaintiffs the Registrar accordingly ordered that judgment be entered for the amount admitted to be owing, and gave leave to the defendant to defend the residue of the plaintiffs' claim.

Held: the burden of proving the return of the watches rested upon the defendant, and in the circumstances of the case he has failed to discharge that burden of proof.

ACTION.

H. G. Hanbury-Sparrow for the plaintiffs.

Chew Choon Poon for the defendant.

Cur. Adv. Vult.

Rigby, J.: — In this action the plaintiff firm claimed the sum of $52,887.50 as the balance due to them by the defendant in respect of goods, to wit, watches sold and delivered by them to the defendant between 26th March, 1953, and the 8th November, 1954.

The defendant, by his defence, admitted the debt to the extent of $7,149.60, but claimed by way of set-off that the plaintiff firm had failed